

In re Patent Application of:  
**ROBERT M. HERRIN**  
Serial No. **10/721,962**  
Filing Date: **11/25/2003**

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### Remarks

Applicant and the undersigned would like to thank the Examiner for his efforts in the continued examination of this application, and again requests the finality of the office action be retracted. Claims 1-19 and 46-56 remain in the case.

Claims 1-19 and 48-56 (specifically claims 1, 8, 48, and 51) were rejected under 35 USC §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 1, 4, 8, 48, and 51 are herein amended to particularly point out and distinctly claim the subject matter which applicant regards as the invention, as guided by the Examiner.

The Examiner reminds the Applicant and the undersigned that while features of an apparatus may be recited either structurally or functionally, claims directed towards an apparatus must be distinguished from the prior art in terms of structure rather than function. Respectfully, and as has been addressed in earlier responses to office actions on the merits of the claims, the first examiner in this case (Examiner Gene Kim for office actions dated 10/21/04, 2/1/05, 6/23/05, and 8/29/05) appears to have selected structural elements from the teachings of the Applicant, and arbitrarily identified structural elements from the cited Tharpe '906 reference without thought as to whether or not the element can work together to provide the apparatus being claimed. Indeed they cannot, as supported by the Declarations of Herrin and Tharpe.

With appreciation, the Applicant and the undersigned are pleased to make the above amendments, especially if they help the current Examiner (Examiner Christopher Harmon) look beyond the originally presented view from the examining group. With regret however, the current Examiner has determined that the Declarations under 37 CFR §1.132 of Herrin and Tharpe are biased because of assumed business relationships between the parties. The Examiner does recognize Herrin and Tharpe as having

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expertise within the field, but feel such expertise is not pertinent to claim interpretation. This conclusion in spite of the facts presented that the structure assumed to be obvious to the Examiner is not enabling and is not structurally that of the claimed invention. By way of example, and with reference to Par. 6 of the Declaration of recognized expert Tharpe, the forming structure of Tharpe '906 "would not work for the present invention." By way of further example of lack of structure, and with reference to the Declaration of recognized expert Herrin, the guide plate called for in Claim 1 does not exist in the Tharpe '906 teachings. Clearly, there is no suggestion to make a list of elements as suggested by the Examiner, to rearrange them, and to modify them to such an extent, based on the single Tharpe '906 reference, except through hindsight based on the guidance of the Applicant and claims in the application.

Acknowledging that the claimed invention was not clear, it would appear to be appropriate to withdraw the finality of the office action to allow further dialogue with the current Examiner in an attempt to effectively and equitably advance this application.

The above referenced office action includes a Restriction of claims 46-47 with a understanding by the Examiner that they are directed to a non-elected invention. Based on the following claim comparison (Claim 1 versus Claim 46) which would appear to show that each claim includes the same structure, the Applicant and the undersigned are puzzled as to why a Restriction is necessary.

1. An apparatus comprising:

(A1) a platen operable for moving between a first position proximate and in spaced relation to a blank and a second position through a biasing of the platen against the blank and a driving of the blank downstream therefrom, the platen having a guide plate operable at a peripheral portion thereof for providing a compression surface;

(A46) a platen operable for movement along a path therefor between a first position and a second position;

(B1) a forming rail positioned downstream the first position for receiving the blank moving thereby and folding portions thereof, wherein a proximal portion of the forming rail partially folds peripheral portions of the blank and a distal portion of the forming rail secures the blank into a partially formed tray, wherein the side walls are fully formed, the distal portion having a side folding rail portion opposing the guide plate for receiving the blank peripheral portions therebetween;

(B46) a forming rail positioned downstream the first position;

(C1) a first folding arm movably positioned for biasing against an extended portion of the partially formed tray for a folding thereof, the first folding arm positioned proximate the distal portion of the forming rail and downstream the proximal portion thereof, wherein the first folding arm is movable between a position allowing the platen to move thereby along a path of the platen to a position within the path and generally perpendicular thereto;

(C46) a first folding arm rotatable about an axis thereof, the first folding arm positioned proximate a distal portion of the forming rail and downstream a proximal portion thereof, wherein the first folding arm is movable between a position for allowing the platen to move thereby along the path to a position within the path;

(D1) a compression plate movably carried in spaced relation to the partially formed tray;

(D46) a compression plate;

(E1) a fixed plate carried in spaced relation to the compression plate and , the fixed plate having a surface thereof generally parallel to the path of the platen, the fixed plate and the compression plate forming a passage therebetween; and

(E46) a fixed plate carried in spaced relation to the compression plate, the fixed plate having a surface thereof generally parallel to the path of the platen, the fixed plate and the compression plate forming a passage therebetween, wherein the compression plate is moveable toward the fixed plate; and

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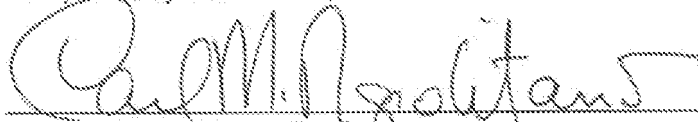
(F1) a second folding arm movable through the passage and positioned for biasing against the extended portion of the partially formed tray and for folding the extended portion through the passage, wherein the fixed plate is positioned for guiding the extended portion along the surface of the fixed plate onto a tray wall for providing a fully formed tray.

(F46) a second folding arm rotatable about an axis thereof for movement through the passage, the axis of the second folding arm being generally perpendicular to the axis of the first folding arm.

It should be noted that the thought when presenting claim 46 was to help the Examiner in understanding the structure of the claimed invention by striking functional language. Respectfully, such a Restriction should only go to further support the need to withdraw the finality of the office action so that an effort can be made to equitably advance this application.

If the further prosecution of the application can be facilitated through telephone interview between the Examiner and the undersigned, the Examiner is requested to telephone the undersigned at the Examiner's convenience.

Respectfully submitted,



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